

State of New Hampshire DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095 (603) 271-1370 FAX (603) 271-1381



July 8, 2002

Mr. Harold R. Smith d/b/a Smitty's Sunoco 2 Dover Road Durham, NH 03828

CERTIFIED MAIL (7099 3400 0003 0687 2493) RETURNED RECEIPT REQUESTED

Re: Notice of Proposed Administrative Fine and Hearing No. AF 02-020

Dear Mr. Smith

The New Hampshire Department of Environmental Services, Air Resources Division, is proposing that administrative fines totaling \$1,300 be imposed against Smitty's Sunoco pursuant to RSA 125-C:15 for violations relating to the Stage II gasoline vapor recovery system.

You are required to respond to this notice. You have a right to a hearing to contest these allegations before the fine can be imposed. Please respond by August 8, 2002, using the enclosed form.

If you wish to have an informal meeting to discuss these issues, please contact the DES Legal Unit at (603) 271-6330. If you have any questions regarding this matter, please call Joseph Ritz at (603) 271-1391.

Sincerely,

Pamela G. Monroe Compliance Bureau Administrator Air Resources Division

Enclosure

G. Rule, DES Legal Unit

R. Kurowski, EPA Region 1

R. Craven, Chairman of Selectmen, Town of Durham



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Mr. Harold R. Smith d/b/a Smitty's Sunoco 2 Dover Road Durham, New Hampshire 03824 NOTICE OF PROPOSED ADMINISTRATIVE FINE AND HEARING No. AF 02-020

I. Introduction

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Air Resources Division ("the Division") to Smitty's Sunoco, pursuant to RSA 125-C:15. The Division is proposing that fines totaling \$1,300 be imposed against Smitty's Sunoco for the violations alleged below. This notice contains important procedural information. Please read the entire notice carefully.

II. Parties

- 1. The Department of Environmental Services, Air Resources Division, is an administrative agency of the State of New Hampshire, having in its principal office at 6 Hazen Drive, Concord, NH.
- 2. Smitty's Sunoco is a gasoline dispensing facility having a mailing address of 2 Dover Road, Durham, New Hampshire.

III. Summary of Facts and Law Supporting Claim

- 1. RSA 125-C authorizes the Department of Environmental Services ("DES") to regulate sources of air pollution. RSA 125-C:4 authorizes the Commissioner of DES to adopt rules relative to the prevention, control, abatement, and limitation of air pollution in New Hampshire. Pursuant to this authority, the Commissioner has adopted NH Admin. Rules Env-A 100 et seq.
- 2. RSA 125-C:15,I-b(b) authorizes the Commissioner to impose administrative fines of up to \$2,000 per offense for violations of any rule adopted pursuant to RSA 125-C.
- 3. Env-A 1205.19 and 1205.20 require gasoline-dispensing facilities in Hillsborough, Merrimack, Rockingham and Strafford counties that meet certain throughput criteria to install a California Air Resources Board ("CARB") certified Stage II vapor recovery system.
- 4. Harold R. Smith is the owner of a gasoline dispensing facility doing business as Smitty's Sunoco, located at 2 Dover Road, Durham, Strafford County, NH 03824 ("the Facility"). The Facility meets the throughput requirements specified in Env-A 1205.19.
- 5. On December 29, 1997, the Air Resources Division ("Division") issued a Letter of Deficiency No. ARD 97-044 to the Facility for the failing to test the Stage II system within 15 days of completion of installation, and failing to submit the notification form and \$200 fee as required by Env-A 1205.

- 6. On February 25, 1998, the Division issued Certificate of Compliance No. II-980025 ("the Certificate") to the Facility.
- 7. Env-A 1205.27 states that a Stage II certificate of compliance shall be valid for no more than three years.
- 8. Env-A 1205.24(a)(2) requires the owner or operator of an applicable gasoline dispensing facility to re-test a Stage II system within 90 days prior to the expiration date of any certification of compliance issued by the Division to the owner.
- 9. Env-A 1205.28(b) requires the owner or operator of an applicable gasoline dispensing facility to pay a non-refundable renewal fee of \$200 to the Division on or before the expiration date of the certificate of compliance.
- 10. Env-A 1205.23 requires the owner or operator of an applicable gasoline dispensing facility to notify the Division in writing at least 5 working days prior to any proposed testing of the date and time such testing will occur, and the name of the person who is responsible for such testing.
- 1 The Facility's Certificate expired on November 1, 2000.
- 12. On February 6, 2001, Division personnel contacted Mr. Smith by telephone and notified him that the Certificate had expired November 1, 2000, that the Stage II system must be retested, and that a \$200.00 renewal fee was due to the Division along with a notification form. A blank notification form was mailed to the Facility.
- On July 22, 2001, Division personnel again contacted Mr. Smith by telephone and notified him that the Stage II vapor recovery certification had expired November 1, 2000, that the equipment was required to be re-tested, and that a \$200 renewal fee was due to the Division along with the notification form. A blank notification form was mailed to the Facility.
- 14. On July 17, 2001, the Facility submitted to the Division the non-refundable renewal fee of \$200 as required by Env-A 1205.28(b).
- 15. On September 13, 2001, the Facility successfully passed a Stage II vapor recovery re-test.
- 16. On October 1, 2001, the Division issued to the Facility Certificate of Compliance No. 2-11030111352, with an expiration date of November 1, 2003.

IV. Violations Alleged and Proposed Administrative Fines

1. Smitty's Sunoco has violated Env-A 1205.24(a)(2) by failing to re-test the Stage II vapor recovery system within 90 days prior to the expiration date of the Certificate. The Division has determined that Violation 1 is a major deviation from the requirements with moderate potential for harm. RSA 125-C:15,I-b(b) specifies a fine range of between \$1,251 and \$1,750. The Division is seeking a fine of \$1,300 for this violation.

2. Smitty's Sunoco has violated Env-A 1205.28(b) by failing to pay the \$200.00 renewal fee required on or before the expiration date of the Certificate. The Division has determined that Violation 2 is a minor deviation from the requirements with minor potential for harm. RSA 125-C:15,I-b(b) specifies a fine range of between \$100 and \$1,000. At this time, the Division is not seeking a fine for this violation.

The total fine being sought is \$1,300.

V. Required Response, Opportunity for Hearing

Pursuant to Env-C 601.06, you are required to respond to this notice. Please respond no later than August 8, 2002, using the enclosed colored form.

- 1. If Smitty's Sunoco would like to have a hearing, please sign the appearance section of the colored form and return it to the DES Legal Unit, as noted on the form. A Notice of Scheduled Hearing will be issued.
- 2. If Smitty's Sunoco chooses to waive the hearing and pay the proposed fine, please have the authorized representative sign the waiver (lower portion) and return it with payment of the fine to the DES Legal Unit.
- 3. If Smitty's Sunoco wishes to discuss the possibility of settling the case, please authorized representative sign the appearance and return it to the DES Legal Unit and call the DES Legal Unit to indicate Smitty's Sunoco's interest in settling. Smitty's Sunoco is required to be represented by an attorney. If Smitty's Sunoco chooses to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

VI. Determination of Liability for Administrative Fines

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that Smitty's Sunoco committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the things sought to be proved is true.

If the Division proves that Smitty's Sunoco committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

Pursuant to Env-C 601.09, the fine will be reduced by 10% for each of the circumstances listed below that Smitty's Sunoco proves, by a preponderance of the evidence, applies in this case:

The violation was a one-time or non-continuing violation, and Smitty's Sunoco did not know about the requirement when the violation occurred, and the violation has not continued or reoccurred as of the time of the hearing, and any environmental harm or threat of harm has been corrected, and Smitty's Sunoco did not benefit financially, whether directly or indirectly, from the violation.

- 2. At the time the violation was committed, Smitty's Sunoco was making a good faith effort to comply with the requirement that was violated.
- 3 Smitty's Sunoco has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
- 4. Other information exists which is favorable to Smitty's Sunoco's case, which was not known to the Division at the time the fine was proposed.

*****IMPORTANT NOTICE****

An administrative fine hearing is a formal hearing. Any hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that Smitty's Sunoco committed the violation(s) alleged above and that the fine(s) should be imposed. The hearing is Smitty's Sunoco's opportunity to present testimony to present testimony and evidence that Smitty's Sunoco did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced. If Smitty's Sunoco has any evidence, such as photographs, business records or other documents, that Smitty's Sunoco believes show that Smitty's Sunoco did not commit the violation(s) or that otherwise supports Smitty's Sunoco's position, Smitty's Sunoco should bring the evidence to the hearing. Smitty's Sunoco may also bring witnesses (other people) to the hearing to testify on Smitty's Sunoco's behalf.

If Smitty's Sunoco wishes to have an informal meeting to discuss the issues, Smitty's Sunoco must contact the DES Legal Unit at (603) 271-6330 to request a prehearing conference.

Information regarding this proposed fine may be made available to the public via the DES Web page (www.state.nh.us.des). If Smitty's Sunoco has any questions about this matter, please contact the DES Legal Unit at (603) 271-6330.

Robert R. Scott
Chief Air Programs Manager

Air Resources Division

Enclosure

Gretchen Rule, DES Legal Unit
Susan Alexant, DES Hearings and Rules Attorney
R. Kurowski, US EPA
Town Council, Town of Durham
ARD Enforcement File